

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW CALVIN LIDDELL,

Defendant-Appellant.

UNPUBLISHED

March 3, 2009

No. 281339

Oakland Circuit Court

LC No. 2007-214278-FC

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of heroin causing death, MCL 750.317a, and sentenced as a third habitual offender, MCL 769.11, to 427 to 720 months in prison. He appeals as of right and we affirm.

Defendant was convicted of selling heroin to Travis Spencer, who later died after using the substance. According to the victim's girlfriend, she and the victim consumed some alcohol and cocaine on the evening of December 27, 2006. At approximately 1:00 a.m. the next day, they went to a house in Detroit to buy heroin. The victim bought six packs of heroin from defendant. The victim used one pack of heroin at the house. He used a syringe to inject himself with another pack of the heroin, after mixing it with water, while his girlfriend drove them to his apartment. He injected a third pack of heroin at the apartment. His girlfriend, who had also injected herself with some of the heroin, became ill. She was still sick when she went to work in the morning. She spoke with the victim before leaving for work. When she returned later that morning, she found the victim slumped over in the bathroom. Efforts to revive the victim were unsuccessful. A deputy medical examiner testified that the victim died from drug use.

On appeal, defendant challenges the constitutionality of MCL 750.317a. Defendant argues that the statute contravenes due process by allegedly imposing strict liability, without requiring any showing of mens rea, and by authorizing a severe penalty. Analogizing the offense to statutory felony murder discussed in *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), defendant also argues that MCL 750.317a permits a jury to infer guilt of homicide based solely on the delivery of drugs. We reject each of defendant's arguments.

Because defendant failed to present this issue in the trial court, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as

constitutional unless its unconstitutionality is clearly apparent.” *People v Gregg*, 206 Mich App 208, 210; 520 NW2d 690 (1994). “The party challenging the constitutionality of a statute bears the burden of proving its invalidity.” *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002).

MCL 750.317a, as added by 2005 PA 167, effective January 1, 2006, is part of the same “homicide” chapter in the Penal Code as the felony-murder statute, MCL 750.316(1)(b). But unlike the felony-murder statute, MCL 750.317a contains no “murder” language. Rather, the statute provides:

A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years. [MCL 750.317a.]

Essential to the holding in *Aaron*, that a conviction of felony murder requires evidence of malice, was the use of the undefined term “murder” in MCL 750.316. Our Supreme Court held that “malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise.” *Aaron, supra* at 728. Because MCL 750.317a is not a statute that defines a degree of murder, but only requires that illegal drug delivery cause the death of a person who consumes the drug, defendant’s reliance on *Aaron* is misplaced. It is plain that MCL 750.317a imposes criminal liability regardless of whether the defendant has a culpable state of mind with respect to the resulting death. An unambiguous statute is applied as written. *People v Mahler*, 156 Mich App 799, 800-801; 402 NW2d 93 (1986).

We further conclude that the absence of a requirement of a culpable state of mind, as it relates to the resulting death, does not render MCL 750.317a constitutionality infirm. The statute requires a culpable state of mind as it relates to the delivery of a substance in violation of MCL 333.7401. A delivery offense is a general intent crime, which requires the intent to do the physical act. *People v Maleski*, 220 Mich App 518, 522; 560 NW2d 71 (1996). “Deliver” or “delivery” is statutorily defined as “the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.” MCL 333.7105(1). The transfer distinguishes the delivery from possession. See *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). The defendant must know that he or she is delivering the controlled substance. *People v Mass*, 464 Mich 625, 638; 628 NW2d 540 (2001).

When a defendant is charged with a true strict liability crime, the prosecutor need only prove that an act was performed, regardless of what the defendant knew or did not know. *People v Lardie*, 452 Mich 231, 240-241; 551 NW2d 656 (1996), overruled in part on other grounds *People v Shaefer*, 473 Mich 418 (2005). “[W]here a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability.” *People v Quinn*, 440 Mich 178, 187; 487 NW2d 194 (1992). Rather, the statute represents a legislative determination that, with respect to a particular element, responsibility for protecting the public should rest with the person who can best avoid the harm. *Id.* at 187-188.

We conclude that MCL 750.317a does not contravene due process. The fact that MCL 750.317a provides a penalty of life or any term of years does not support a different result. The statute does not to attempt to regulate conduct that would otherwise be innocent, but rather punishes a person's illegal act of delivering drugs when that act causes the death of a person who consumes the drugs. Such conduct is *malum in se*. See *Lardie, supra* at 255. All that is required to pass constitutional muster is a conceivable rational basis for the Legislature to conclude that the deterrent effect of the statute is warranted to protect the public. See *People v Derror*, 475 Mich 316, 338-340; 715 NW2d 822 (2006) (noting that under the rational basis test, a court does not consider statutory consequences, but rather the statutory purpose and whether any conceivable set of facts might support the Legislature's judgment); see also *State v Maldonado*, 137 NJ 536; 645 A2d 1165 (1994) (upholding the constitutionality of a statute authorizing a prison sentence of 20 years for distribution of drugs that results in death). Considering the risks posed by illegal drug deliveries, defendant has failed to show that the statute is constitutionally infirm.

Next, defendant seeks resentencing on the ground that offense variable (OV) 3, MCL 777.33, was misscored at 100 points. Defendant asserts that the correct score should have been 25 points. This argument is moot because the trial court made this correction when denying defendant's motion for resentencing. When combined with the court's other corrections to the scoring of the offense variables, which defendant does not challenge, the appropriate guidelines range remained 171 to 427 months. Because there was no change in the appropriate guidelines range, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood